Perbadanan Pengurusan 3 Two Square v 3 Two Square Sdn Bhd

HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-510–07 OF 2013
GUNALAN MUNIANDY J
18 APRIL 2017

Legal Profession — Disqualification — Conflict of interest — Application to recuse firm of advocates and solicitors from representing plaintiff company — Whether there was conflict of interest — Legal Profession (Practice and Etiquette) Rules 1978 rr 28 & 29 — Legal Profession Act 1976

On 14 November 2016, the plaintiff filed an ex parte leave application to commit a defendant's witness ('the said witness') for contempt of court by an alleged act of perjury. In resisting that application, the defendant filed this application ('the defendant's application') to recuse one of the co-counsel of the plaintiff's solicitors ('the co-counsel') from further conduct of this case on the ground of conflict of interest. The defendant filed this application on the basis of non-compliance with rr 28 and 29 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'). The grounds which the defendant relied on, amongst others, are: (a) the co-counsel had sworn an affidavit in support that he had deposed the said witness and the said witness had given false testimonies on oath in several instances. The co-counsel had also made adverse comments and allegations against the witness; (b) the co-counsel alleged that the said witness had given false testimonies based merely on notes of evidence that had yet to be approved and finalised by the parties; (c) the co-counsel filed the affidavit in support of the committal proceedings against the said witness which contained material facts disclosed by the defendant and another witness which had given rise to a conflict of interest contrary to rr 28 and 29 of the Rules; and (d) the plaintiff's solicitors were potential witnesses for the plaintiff in the contempt proceedings and no longer competent to represent plaintiff as solicitors in this action. If the firm of solicitors were permitted to act, it would place the credibility of the solicitors at stake and prejudice the said witness and the defendant. It was important that public trust in the court be assured and that litigants should not be led to believe that they would face shortcomings in court.

Held, dismissing the defendant's application with costs:

(1) Having applied the objective test to the facts, the court found that the defendant had not demonstrated sufficient and cogent grounds for the court to make the drastic order for recusing or disqualifying the firm of solicitors representing the plaintiff from further conduct of this case which had proceeded to an advanced stage and nearing conclusion with

substantial evidence having been recorded. To make the order sought at this stage would be unduly obstructive to the fair and prompt disposal of this case which had already been inordinately delayed (see para 13).

(2) Under the peculiar facts and circumstances of this case, the defendant had not satisfied the court that the plaintiff's solicitors by bringing the contempt action had compromised their independence and impartiality or breached any etiquette rule such that it rendered them unfit and incompetent to conduct the litigation of this suit any further. It defied logic how the plaintiff's solicitors by commencing the said action arising solely from conflicting evidence at the trial given by the proposed contemnor could have placed themselves in a conflict of interest situation. The defence proposition in this regard was nothing short of being preposterous (see para 12).

[Bahasa Malaysia summary

Pada 14 November 2016, plaintif memfailkan permohonan ex parte untuk kebenaran prosiding komital saksi defendan ('saksi tersebut') kerana menghina mahkamah atas suatu tindakan sumpah bohong. Dalam menangguhkan permohonan itu, defendan memfailkan permohonan ('permohonan defendan') untuk salah satu peguam dari pihak peguamcara plaintif untuk mengundur diri ('peguam bersama') daripada menjalankan kes ini atas alasan konflik kepentingan. Defendan memfailkan permohonan ini berdasarkan ketidakpatuhan kk 28 dan 29 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Etiket) 1978 ('Kaedah tersebut'). Alasan defendan yang digunakan, antara lain: (a) peguam bersama telah mengangkat sumpah afidavit untuk menyokong bahawa dia telah melepaskan saksi tersebut telah memberikan kesaksian palsu atas sumpah dalam beberapa situasi. Peguam bersama juga telah membuat komen dan tuduhan yang menentang dengan saksi; (b) peguam bersama mendakwa bahawa saksi tersebut telah memberikan kesaksian palsu berdasarkan hanya nota bukti yang masih belum dilulus dan ditamatkan oleh pihak-pihak; (c) peguam bersama itu memfailkan afidavit sebagai menyokong prosiding komital terhadap saksi tersebut yang mengandungi fakta material yang didedahkan oleh defendan dan saksi lain yang telah menimbulkan konflik kepentingan yang bertentangan dengan kk 28 dan 29 Kaedah tersebut; dan (d) peguamcara plaintif adalah saksi yang berpotensi bagi plaintif dalam prosiding penghinaan dan tidak lagi kompeten untuk mewakili plaintif sebagai peguamcara dalam tindakan ini. Sekiranya firma peguamcara dibenarkan untuk bertindak, ia akan meletakkan kredibiliti peguam yang dipertaruhkan dan menjejaskan saksi tersebut dan defendan. Adalah penting agar kepercayaan orang awam terhadap mahkamah dapat dipastikan dan litigan tidak boleh didorong untuk mempercayai mereka akan menghadapi kelemahan di mahkamah.

Diputuskan, menolak permohonan defendan dengan kos:

(1) Setelah melaksanakan ujian objektif kepada fakta-fakta, mahkamah mendapati bahawa defendan tidak menunjukkan alasan yang mencukupi dan meyakinkan bagi pengadilan untuk membuat perintah drastik untuk menarik balik atau membatalkan firma peguam yang mewakili plaintif dari bertindak selanjutnya dalam kes ini yang telah berjalan pada peringkat hampir selesai dan kesimpulan yang hampir dengan bukti ketara yang telah direkodkan. Untuk membuat perintah di peringkat ini akan menjadi terlalu obstruktif kepada pelupusan yang adil dan cepat kes ini yang telah lama ditangguhkan (lihat perenggan 13).

(2) Berdasarkan fakta dan keadaan yang aneh dalam kes ini, defendan tidak berpuas hati dengan mahkamah bahawa peguamcara plaintif dengan membawa tindakan penghinaan itu telah menjejaskan kebebasan dan kesaksamaan mereka atau melanggar mana-mana peraturan-peraturan etika sedemikian sehingga menjadikan mereka tidak layak dan tidak cekap untuk menjalankan litigasi saman ini. Ia menentang logik sebagaimana peguamcara plaintif telah memulakan tindakan tersebut yang timbul semata-mata dari bukti yang bertentangan pada perbicaraan yang diberikan oleh penghina yang dicadangkan itu boleh meletakkan diri mereka dalam situasi konflik kepentingan. Cadangan pertahanan dalam hal ini tidak masuk akal (lihat perenggan 12).]

Notes

For cases on conflict of interest, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1604–1605.

Cases referred to

Everingham v Ontario [1992] OJ No 304; (1992) 88 DLR (4th) 755 (refd)
Perbadanan Pembangunan Pulau Pinang v Tropiland Sdn Bhd [2009] MLJU 120; [2010] 2 CLJ 1061, HC (refd)
Tanjong Marina Management Sdn Bhd v Penang Port Sdn Bhd [2014] 10 MLJ 120; [2012] 1 LNS 1249, HC (refd)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 rr 28, 28(a), (b), 29

Adrian Silvarajoo (Nik Abdul Matin Fawwaz bin Nik Safeia and Mohamad Atif bin Abdullah with him) (Ramli Yusuff & Co) for the plaintiff.
Christie Soosay Nathan (Nor Aqilah bt Ahmad Nasar with him) (Christie Soosay Nathan & Assoc) for the defendant.

Gunalan Muniandy J:

[1] This is an application by the defendant in the main suit that arises out of ex parte application by the plaintiff for leave to commit a witness for the

defendant ('DW4') for contempt of court by an alleged act of perjury. Vide this application, made on the basis of non-compliance with rr 28 and 29 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'), the defendant seeks, inter alia, to recuse the firm of solicitors representing the plaintiff, Messrs Ramli Yusof & Co ('RY') from further conduct of this case on the ground of conflict of interest on the part of co-counsel one Nik Abdul Matin Fawwaz bin Hj Nik Safeia ('Nik Matin'), from the same firm.

GROUNDS OF APPLICATION

(1) The plaintiff's solicitors had filed an ex parte notice of application dated 14 November 2016 for leave for an order of committal against a defence witness ('DW4') and the court had granted the order that was sought on 25 November 2016.

(2) Nik Matin, who was a co-counsel for the plaintiff at the trial of this action and present during the testimony of DW4 had sworn an affidavit in support ('AIS') in which he deposed that DW4 had given false testimonies on oath in several instances and made adverse comments and allegations against the witness.

(3) Nik Matin alleged that DW4 had given false testimonies based merely on notes of evidence that had yet to be approved and finalised by the parties.

(4) Nik Matin filed the affidavits in support of the committal proceedings against DW4 which contained material facts disclosed by the defendant and DW2 and which had given rise to a conflict of interest contrary to rr 28 and 29 of the Rules.

(5) The plaintiff's solicitor were potential witnesses for plaintiff in the contempt proceedings and no longer competent to represent plaintiff as solicitors in the instant civil action. If the firm of solicitors, Messrs RY & Co were permitted to act for P1 it would place the credibility of the solicitors at stake and prejudice DW4 and the defendant. It is important that public trust in the court be assured and that litigants should not be led to believe that they would face shortcomings in court.

THE LAW APPLICABLE

[2] Rules 28 and 29 of the Rules govern the disqualification of an Advocate and Solicitor from appearing in a case where he is likely to be a witness. They state expressly that:

28 Advocate and Solicitor not to appear in a case where he is a witness

(a) An advocate and solicitor shall not appear in Court or in chamber in any case in which he has reason to believe that he will be witness in respect of a material and disputed question of fact, and if while appearing in a case it

becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.

(b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.

(c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.

29 Advocate and solicitor not to testify on behalf of client.

Except when essential to the ends of justice or as to merely formal matters, an advocate and solicitor appearing in any cause shall not testify in Court on behalf of this client only in that cause.

[3] In *Perbadanan Pembangunan Pulau Pinang v Tropiland Sdn Bhd* [2009] MLJU 120; [2010] 2 CLJ 1061, Balia Yusof J (now FCJ) expounded on the principles relating to the issue at hand as follows:

... *What is 'incompatible with the best interest of the administration of justice' is a question of fact to be decided on the merits of each case. Speaking of conflict, the objective test to be applied is not whether there is actual conflict but that there be no appearance of conflict*. It has also been said that it is the appearance of fairness in the eyes of the public that is fundamentally important. Sopinka J in the case of *Martin v Gray* 77 DLR (4th) 249 stated that the *sine qua non* of the justice system is that there be an unqualified perception of its fairness in the eyes of the general public. There is first of all the concern to maintain the high standard of the legal profession and the integrity of our system of justice, and to achieve this, a strict test ought to be observed in ensuring that not only there be no actual conflict but there be no appearance of conflict. The family court of Australia in *Thevenaz and Thevenaz* [1986] FLC 91-748 said:

> *It is of utmost importance that justice should not only be done but should appear to be done. In the circumstances of the present case, there is a risk which may well be merely theoretical but still exists, that justice might not appear to be done*.

...

[8] On the power and the role of the court, Mandie J in *Martin v Gray* referred to the position in Canada and set out the following passages from a decision of the full court of the Ontario Divisional Court in *Everingham v Ontario* [1992] 88 DLR (4th) 755 at pp 761–762:

> It is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require by reason of conflict or otherwise. This power does not depend on the rules of professional conduct made by the legal profession and is not limited to cases where the rules are breached.
>
> The issue here is not whether or not the rule was breached, or whether the solicitor worked for the government. Nor is it solely whether the patient lost

A confidence in the process. *The issue is whether a fair-minded reasonably informed member of the public would conclude that the administration of justice required the removal of the solicitor …*

The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public … The goal is not just to protect the interests of the individual litigant but even more importantly to protect public confidence in the administration of justice …

The disqualification of a counsel is not imposed as a punishment for misconduct. Rather it is a protection for the parties and the wider interest of justice. *The legitimacy of judicial decision depends in large part on the observance of the standards of procedural justice. There is the courts' concern with the administration of justice in a particular case and in the generality of cases and with the associated basic need to preserve confidence in the judicial system. The right to a fair hearing in the courts is an elementary but fundamental principle of our system of justice. The courts have an inherent jurisdiction to control its own processes except as limited by statute and as an incident to that inherent jurisdiction, it shall determine which persons should be permitted to appear before it as advocates*. (*Black v Taylor* [1993] 3 NZLR 403).

[4] In the context of the incompetency of an advocate and solicitor to represent a litigant on account of his clear personal and pecuniary interest in the outcome of the case at hand, it would be enlightening to make reference to the case of *Everingham v Ontario* [1992] OJ No 304; (1992) 88 DLR (4th) 755 as cited with approval by a High Court in *Tanjong Marina Management Sdn Bhd v Penang Port Sdn Bhd* [2014] 10 MLJ 120; [2012] 1 LNS 1249, where it was held:

The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public ... The goal is not just to protect the interests of the individual litigant but even more importantly to protect public confidence in the administration of justice ...

[15] To be able to maintain and protect the public confidence in the administration of justice particularly in the conduct of a fair trial in a court of law, the impartiality and integrity of the Bar in the administration of justice in relation to the litigant in a suit cannot be undermined by allowing an advocate and solicitor, may he be a partner or a legal assistant from the same legal firm, to represent that litigant, as the plaintiff in the instant case, when the advocate and solicitor partner of the said legal firm has direct personal and/or pecuniary interest in that litigant company. To permit so may be seen or perceived as a 'back-door' way of the said advocate and solicitor representing himself or the company which he has the direct interest in the conduct of the case. This court cannot condone such probable or tangible risk which affects the administration of justice in the conduct of a fair trial. The impartiality of the judicial system must not be compromised.

[5] It can be gleaned that the principle of utmost importance on disqualification of a solicitor is that public confidence in the administration of

justice must at all times be maintained and protected. In this regard, it is of equal importance that each case of disqualification of counsel from appearing for a party must be determined based on the merits of its own peculiar facts to which the established principles should be applied. Whether there is conflict of interest is very much dependent on perception of the public of the existence of such conflict that would justify counsel being disqualified from continuing to appear in the case rather than existence of actual conflict. An objective test has to be applied to the facts of the particular case to determine whether a case of appearance of conflict has been sufficiently made out to justify removal of counsel. It is not in every case where the advocate and solicitor is a potential witness that he should be removed or recused causing the litigant to be denied the fundamental right of representation by counsel of his choice.

[6] It has to be emphasised that the explicit terms of r 28(a) and (b) of the Rules ought to be strictly adhered to before the court invokes its discretionary powers to order disqualification of counsel which has far-reaching consequences. This is particularly so when the trial has proceeded at length to an advanced stage.

FINDING

[7] The power to disqualify or recuse counsel who is appointed by a litigant from appearing in the trial of a contested suit is a wide discretionary power vested in the trial court. Considering the serious and far-reaching implications of its exercise, the power must be exercised judicially and fairly with care and caution on correct principles. The impact of an order of recusal of counsel on the fundamental right of a litigant to counsel of his choice should also be seriously considered. Basically, the defendant's application (L 123) is grounded on the provisions of rr 28 and 29 of the Rules which restrict counsel from appearing in a case where he is potentially a witness on disputed and material facts such that he should cease to appear any further if it does not jeopardise his client's interests.

[8] It is settled law that while principles of general application on the issue of recusal should be stringently adhered to, the facts and circumstances of a particular case are of paramount importance in determining whether it is justified to make the order upon careful consideration of the reasons advanced for the recusal.

[9] First and foremost, the ex parte application for leave to commit (L 108) though made in the same proceedings as the present suit, is a separate and distinct action from the plaintiff's claim and the defendant's defence. The issues for determination are clearly different though they are inter-related to the credibility and truthfulness of a witness for the defendant secondly, the

proposed contemnor ('PC') is not a litigant or party to the suit but merely a witness, albeit material and important witness, called by the defendant. Neither is he the authorised representative of the defendant in defending this claim. Although his credibility is an important issue to the outcome of the case, this is an issue to be determined by the court solely upon evaluation and analysis of the evidence as a whole without any undue influence by the ex parte contempt order. Equally important is the fact that Nik Matin is likely to be a witness only in the proposed committal proceedings which is a separate exercise from the main trial.

[10] Thirdly, the plaintiff made the application only after having completed the cross-examination of the PC and what was left was his re-examination in which the plaintiffs' solicitors had no part to play. As the main part of his evidence had been presented the possible effect of the solicitors entering into the fray or losing their independence in respect of the ongoing trial is not a question that should arise. The risk of such event can be safely discounted. The remaining witness is not the subject of the contempt action and as such, may be fairly cross-examined by the said solicitors without any prejudice to the defence case.

[11] Next is the fact that the leave order was sought by the plaintiff not based on extraneous matters or documents in the possession of the solicitors but based wholly on the evidence of the PC himself, which on the face of it appeared to be contradictory and inconsistent. Merely because a co-counsel swore an affidavit alluding to the alleged contradictory statements by the witness would not affect the neutrality and impartiality of the entire firm of the plaintiff's solicitors to the prejudice of the defendant to such extent that it would affect the administration of justice in this case. The contention of the defendant in this regard is wholly erroneous and misconceived. It is clearly contrary to established principles and far-fetched without any regard to the peculiar circumstances of this case and thus, unwarranted.

[12] It is my considered view that under the peculiar facts and circumstances of this case, the defendant has not satisfied the court that the plaintiff's solicitors by bringing the contempt action had compromised their independence and impartiality or breached any etiquette rule such that it rendered them unfit and incompetent to conduct the litigation of this suit any further. It defies logic how the plaintiff's solicitors by commencing the said action arising solely from conflicting evidence at the trial given by the PC could have placed themselves in a conflict of interest situation. The defence proposition in this regard is nothing short of being preposterous.

[13] On the aforesaid grounds, having applied the objective test to the facts, I find that the defendant has not demonstrated sufficient and cogent grounds

for the court to make the drastic order of recusing or disqualifying the firm of solicitors representing the plaintiff from further conduct of this case which has proceeded to an advanced stage and nearing conclusion with substantial evidence having been recorded. To make the order sought at this stage would be unduly obstructive to the fair and prompt disposal of this case which has already been inordinately delayed.

[14] For these reasons, L 123 is found to be baseless and devoid of any merits and is therefore, dismissed with costs.

Defendant's application dismissed with costs.

Reported by Lee TJ